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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HERBERT JORDAN

Petitioner,

v.

MARGARET M. HECKLER
Secretary of the Department of
Health and Human Services

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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49 pp

QUESTIONS PRESENTED

(1) Whether the Respondent in making Social Security disability determinations is required by the doctrine of collateral estoppel or the doctrine of *res judicata* to accept as indisputable fact, the facts in the Court's Findings of Fact made by the Court of Claims or other courts in prior litigation to which the United States and the Social Security disability benefits applicant were both parties.

(2) As to facts judicially found and determined by the Court of Claims or other courts in prior litigation to which the United States and Social Security disability benefits applicant were both parties, whether 42 U.S.C. § 405(g) or the *Mann* v. *Gardner*, 380 F.2d 182 (C.A. 5, 1967) principle against considering "extra-record evidence" in judicially reviewing Social Security disability cases overrules or prevents the invocation of the doctrine of collateral estoppel or the doctrine of *res judicata*, as those doctrines have been enunciated in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), *United States* v. *Moser*, 266 U.S. 236 (1924), and *United States* v. *Stauffer Chemical Co.*, ___ U.S. ___, 104 S.Ct. 575 (1984).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Herbert Jordan, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled case on January 31, 1984, and issued as Mandate on March 28, 1984.

OPINIONS BELOW

The unreported Recommendation of the Magistrate of the United States District Court for the Middle District of Alabama is printed in Appendix A hereto, *infra* page 1a. The unreported Opinion of the District Court is printed in Appendix B hereto, *infra*, page 10a, said opinion adopted

the said Magistrate's Recommendation. The Judgment of the District Court is printed in Appendix C hereto, *infra*, page 11a. The unreported Opinion of the United States Court of Appeals for the Eleventh Circuit is printed in Appendix D hereto, *infra*, page 13a. The Judgment of the Court of Appeals is printed in Appendix E hereto, *infra*, page 22a. The Order of the Court of Appeals denying rehearing is printed in Appendix F hereto, *infra*, page 24a. The decision of the Administrative Law Judge of the Respondent is printed in Appendix G hereto, *infra*, page 26a.

JURISDICTION

This Judgment of the Court of Appeals (Appendix E, *infra*, page E-1) was entered on January 31, 1984. A timely petition for rehearing was denied on March 20, 1984 (Appendix F, *infra*, page F-1). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 405(g) which in pertinent part provides as follows:

> § 405(g) *Judicial review.* Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or such further time as the Secretary may allow. [venue provision omitted] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secreta-

ry, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, * * *.

This case also involves 42 U.S.C. § 423(d) which in pertinent part provides as follows:

§ 423(d). *Definition of Disability.* (1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted for or can be expected to last for a continuous period of not less than 12 months; or

(B) [omitted - deals with "blindness" and is inapplicable]

(2) For purposes of paragraph (1)(A)—

(A) [Omitted]

(B) an individual ([inapplicable exceptions omitted]) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, educaion, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether a specific job vacancy exists for him, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceeding sentence (with respect to any individual) "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

STATEMENT OF THE CASE

This is a Social Security disability case brought by the Petitioer pursuant to 42 U.S.C. § 405(g). The Respondent denied Petitioner's application for disability benefits relying on a decision of an Administrative Law Judge ("A.L.J." hereinafter). The A.L.J.'s decision is reproduced in Appendix G hereto, *infra*, p. 26a

The A.L.J. in his decision dated November 15, 1975 found *inter alia* that Petitioner while on the payroll of the Veteran's Administration ("V.A." hereinafter) Hospital as a nursing aide, "performed to the obvious satisfaction of the parties in this work activity." (Appendix G, p. 31a). The A.L.J. used this assumption as a basis for determining that Petitioner was not disabled within the meaning of 42 U.S.C. § 423(d).

The Court of Claims in *Jordan* v. *United States*, 205 Ct.Cl. 65 (1974), reversed the U.S. Army's board for the correction of military records and changed Petitioner's regular honorable discharge to an honorable disability discharge. The Army, like the A.L.J., was relying on Petitioner's so-called work at the V.A. Hospital as support for the position that the Petitioner was not disabled at the time of his discharge from the Army and that this nursing aide position was indicative of residual ability to engage in substantial gainful activity. The Court of Claims in its "*Findings of Fact*" ¶ 21.(a) quoted a V.A. Hospital physician and judicially found as fact as follows:

> [From] Gross examination and observation of this veteran [Petitioner], one cannot see how he can be a nursing assistant at VAH [V.A. Hospital]. *He is not physically able to do the work anywhere near satisfactorily enough to be worth hiring a man in this situation.* 205 Ct.Cl. at 99. [emphasis added]

The Court of Claims' decision of July 19, 1974 was never appealed to the Supreme Court, and was never modified

by the Court of Claims. It is thus a final decision, which binds Petitioner and the United States and all officers of the United States. The Respondent, as an officer of the United States, could not, through his A.L.J.'s decision of November 15, 1975 (one year and four months after the Court of Claims' decision was issued), find that Petitioner's employment at the V.A. Hospital was "to the obvious satisfaction" of everyone, when the Court of Claims had previously found that Petitioner was unable to do the work "satisfactorily." If the Respondent was collaterally estopped from making such finding, or if the Respondent was barred under *res judicata* from making such a finding, *a fortiori*, the Respondent could not say that the Petitioner's employment at the V.A. Hospital constituted evidence of ability to "engage" in "substantial gainful activity." In this regard a reading of the Court of Claims' decision and the A.L.J.'s decision (Appendix G hereto) would be beneficial to a more complete understanding of the case. Because of the space limitations imposed upon a certiorari petition, only this, the most egregious example of conflict can be even summarily presented.

The District Court, accepting the Magistrate's Recommendations, and overruling Petitioner's objections thereto, affirmed the decision of the Respondent in denying disability benefits to Petitioner (Appendices A, B, and C). The Court of Appeals affirmed the District Court in an unreported decision (Appendices D and E), and denied Petitioner's application for rehearing (Appendix F).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court Of Appeals Has Decided A Federal Question In A Way In Conflict With Applicable Decisions Of This Court

The Court of Appeals' decision (Appendix D) admits that "the findings of the [A.L.J.] directly conflict with the

findings of the Court of Claims" (Appendix D, p. 18a). While the Court of Appeals ostensibly "declined" to decide if *res judicata* or collateral estoppel applied (Appendix D, p. 19a), the Court of Appeals, agreeing with the District Court, said "a review of the decision of the Secretary must be limited to an examination of the evidence before the [A.L.J.]. The court is not allowed to look at evidence beyond the record in determining whether the criteria of substantial evidence was met. *Mann* v. *Gardner*, 380 F.2d 182, 187 (5th Cir., 1967)" (Appendix D, p. 19a). Thus, in relying on the so-called "extra-record evidence" rule, the courts below improperly refused to acknowledge or give effect to the judicial doctrines of collateral estoppel or *res judicata*, as enunciated by the Supreme Court in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), *United States* v. *Moser*, 266 U.S. 236 (1924), and *United States* v. *Stauffer Chemical Co.*, ___ U.S. ___, 104 S.Ct. 575 (1984).

The companion doctrines of collateral estoppel and *res judicata* are judicial doctrines, and the Supreme Court, as the supreme judicial body, should set the parameters of, and any exceptions or limitations to those doctrines. The Supreme Court's above-cited cases do not set or recognize explicity or impliedly, the limitations imposed on those doctrines by the lower courts in this case.

In fact, the words of the judicial review section of the Social Security Act, impliedly, if not explicitly authorize reviewing courts to look at matters other than "the record."

> * * * The court shall have power to enter, *upon the pleadings and transcript of the record*, a judgment affirming, modifying, or reversing the decision of the

> Secretary, ... * * *. 42 U.S.C. § 405(g). [emphasis added]

The Recommendation of the Magistrate (Appendix A, p. 3a) notes that Petitioner filed pursuant to Rule 12(f) of the Federal Rules of Civil Procedure (F.R.C.P.) a Motion to Strike portions of the Respondent's Answer because of the Respondent's failure to recognize and give effect to the Court of Claims' findings of fact in *Jordan* v. *United States, supra.* Petitioner also filed objections to the Magistrate's Recommendations. The District Court overruled these objections (Appendices B and C). Although the Motion to Strike and the Objections to the Magistrate's Recommendation were not "pleadings" as defined by Rule 7(a), F.R.C.P., they should and, in the interest of justice, must be considered "pleadings" within the meaning of 42 U.S.C. § 405(g) as they raise or seek to invoke the doctrines of *res judicata* and collateral estoppel at the only appropriate points in the litigation. These doctrines are defensive doctrines to be invoked once a party to the second litigation advances a position or theory different from what is proper under the decision of the first litigation—i.e., until the Respondent answered the Complaint Petitioner could not know what position Respondent would take and it would have been, at best, premature to raise these doctrines in the Complaint. Further, a Motion to Strike the Answer (or part of it) is an attack on a "pleading" (as defined by Rule 7(a), F.R.C.P.) and, if granted, would alter that "pleading." Consequently a motion to strike a Rule 7(a) "pleading" is in substance, a pleading, because it will (upon the Court's order) leave as is or alter the "pleading" being attacked.

Thus, the "pleadings and transcript" of this case contain everything that was needed to decide this case, and the lower courts erred in holding that the "extra-record evidence" rule barred consideration of the Court of

Claims' Findings of Fact and erred in refusing to apply to the doctrines of *res judicata* or collateral estoppel.

II.

The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court - viz. In Litigation Reviewing A Denial Of Social Security Disability Benefits, Can The Secretary, As An Officer Of The United States, Be Collaterally Estopped From Disputing Facts Judicially Found In Prior Litigation Between The Social Security Claimant And The United States?

The decisions of the Supreme Court on *res judicata* and collateral estoppel have never dealt with this specific issue before. Indeed, *it is a novel issue* within the Federal judicial system, as far as Petitioner's counsel can determine. There have been previous cases, which will not be cited, which have held that a decision by one *federal government agency* as to disability is not binding on the Secretary. Indeed, Petitioner readily concedes that a determination of disability by another agency should be considered by, but is not binding on the Secretary. In this case, however, we are talking about a *federal court decision*, as opposed to a mere *federal agency decision. Res judicata* has limited effect in the area of administrative law. However, *res judicata* and collateral estoppel are the cornerstones of the judiciary's attempt to have consistent decisions and to promote judicial economy.

The Supreme Court, while never deciding this issue, has indicated in old and new case decisions that the answer to the question is a resounding "yes." First, the Supreme Court has held that a judgment of the Court of Claims is valid and binding on the parties and their privies unless revised by the Supreme Court on appellate review, and that no executive department of the United

States can revise such a judgment. *United States* v. *O'Grady*, 22 Wall. 641 (1875). Second, the Supreme Court has held:

> There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government. * * * Where a suit binds the United States, it binds its subordinate officials. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. at 403.

Third, in *United States* v. *Moser*, the Supreme Court said:

> The general principle announced in numerous cases is that a right, question, or *fact* distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, *cannot be disputed in a subsequent suit* between the same parties of their privies; and even if the second suit is for a different cause of action, the right, question, or *fact once so determined must*, as between the same parties or their privies, *be taken as conclusively established*, so long as the judgment in the first suit remains unmodified. 266 U.S. at 241 [emphasis added]

Lastly, in *United States* v. *Stauffer Chemical Co.*, ____ U.S. ____, 104 S.Ct. 575, at 578 (1984), the Supreme Court reinforced the *Moser* holding (without citing it) by saying:

> As commonly explained, the doctrine of collateral estoppel *can apply to preclude relitigation of* both issues of law and *issues of fact*, if those issues were conclusively determined in a prior action. [emphasis added]

Thus, the language of the Supreme Court's above-cited cases, indicates that the Court would say that the Court

of Claims' decision in *Jordan* v. *United States*, 205 Ct.Cl. 65 (1974), is binding upon the Respondent and the Courts that have reviewed the Respondent's decision to deny Social Security disability benefits. However, this issue should be directliy addressed by the Supreme Court not only because it is novel, but because the lower courts have answered the issue incorrectly by refusing to address it, and the lower courts have thus also failed to follow the law as laid down by this court.

CONCLUSION

WHEREFORE, your humble Petitioner prays that a Writ of Certiorari be granted for the foregoing reasons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari, including all Appendices thereto, have been served on The Solicitor General of the United States, by sending him the same by First Class United States Mail, postage prepaid and properly addressed.

Dated this the 1st day of June, 1984.

Allen W. Howell
ALLEN W. HOWELL
Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 80-0116-N

HERBERT JORDAN,

Plaintiff

v.

PATRICIA HARRIS, as Secretary of the United States Department of Health, Education and Welfare,

Defendant

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF ALA.
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RECOMMENDATION OF THE MAGISTRATE

Herbert Jordan, plaintiff, was a claimant for Social Security disability benefits under the Social Security Act, as amended His claims were denied administratively. Upon an application filed July 27, 1973, denied initially and on reconsideration by the Social Security Administratin he requested a heraing before an Administrative Law Judge (ALJ) who concluded that he was not under a disability. The Appeals Council reviewed the ALJ's decision and affirmed.

The plaintiff then filed a timely complaint in this Cort pursuant to 42 U.S.C. 405(g) for a judicial review of the disallowance to him of disability benefits under the Act, as amended.

PLEADINGS

The pleadings in this case consist of a complaint filed pursuant to 42 U.S.C. 405(g) in which the plaintiff asserts that the decision of the Secretary through the ALJ is not supported by substantial evidence. The relief the plaintiff seeks is for this Court to review the Secretary's decision and to award the plantiff benefits and to allow the plaintiff 's attorney a reasonable attorney's fee payable out of the retroactive accrued benefits found to be due.

To the complaint, the defendant Secretary, now officially known as the Secretary of "Department of Health and Human Services" by reason of a name change effective May 4, 1980, and requiring no action on the part of the plaintiff to amend and so designate, has filed an answer. Pursuant to 405(g) of the statute, the defendant Secretary has submitted as a part of her answer a certified copy of the administrative transcript.

After the filing of the defendant's answer, the plaintiff then filed a motion to strike paragraphs 2, 3 and 5 from the defendant's answer. In the motion to strike the plaintiff asserts as support thereof that the ALJ is making his findings in plaintiff's case failed to take notice of findings of fact and conclusions that the U.S. Court of Claims made in *Jordan* v. *United States*, 205 Ct. C1. 65 (1974), which apparently was a case which the plaintiff, Herbert Jordan, had filed against the United States concerning some dispute he appeared to have with the Army or the Veteran's Administration. In the motion the plaintiff claims that the defendant Secretary is estopped from making findings and conclusions as to plaintiff's physical condition or ability to work which is different from those which were found and established by the Court of Claims.

Subsequent to the plaintiff's motion to strike the parties hereto appear to have engaged in a pleding contest. For instance, the defendant Secretary filed a motion for extension of time in which to file a brief, the plaintiff filed a response in opposition thereto, the defendant then filed a motion for an extension of time to respond to the plaintiff's motion to strike to

which the plaintiff again responded in opposition thereto. The defendant then responded to the plaintiff's motion to strike a part of the defendant's answer to which the plaintiff replied and asserted a second motion to strike. The defendants then filed a rebuttal to the plaintiff's reply to defendant's response to plaintiff's motion to strike and the plaintiff moved to strike this rebuttal.

The only pleading filed subsequent to the defendant's answer in this cause that needs any attention is the motion to strike parts of the defendant's answer. Upon consideration, the Magistrate determines that there is no merit to this motion and should be denied as well as all other motions filed subsequent thereto. In effect, by his motion to strike parts of the defendant's answer and to assert estoppel against the defendant from making findings or conclusions in this case different from those found in the U.S. Court of Claims action misconstrues on the part of the plaintiff the severe statutory requirements demanded by the Social Security Act. It also miscomprehends the limited judicial responsibility placed upon a Federal District Court by the Act. 42 U.S.C. 405(g), *inter alia*, provides that when a complaint is timely filed in a district court by a dissatisfied Social Security claimant that the Secretary file an answer and to make as a part of the answer a certified copy of the administrative transcript made before an ALJ. The Act further provides for a very limited jurisdictional review in this Court and commands that if the decision of the ALJ is supported by substantial evidence the decision then dstands. A reviewing court may not reweigh evidence nor substitute its judgment for that of the Secretary. *Laffon* v. *Califano*, 558 F.2d 253 (5th Cir. 1977).

The Social Security regulations also provide that a disability determination by another federal agency is not binding on Social Security for the reason that the Social Security Act provides its own standards and criteria in defining "disability." *See* Skeels v. Richardson, 453 F.2d 882 (5th Cir. 1972), *cert. denied*, 409 U.S. 857 (1972). In effect, it appears to the Magistrate that the plaintiff is asking this Court, in order to sustain

his motion to strike, to consider extra record evidence, to-wit, the proceedings in the Court of Claims, in order to make a determination in this case. This cannot be done. This Court's limited review in this case is confined to a determination as to whether or not the Secretary's decision in this case is supported by substantial evidence and this determination can be made only and exclusively on the certified administrative record. The record here contains no U.S. Court of claims proceedings or findings. *See Mann* v. *Gardner*, 380 F.2d 182 (5th Cir. 1967), and *Johnson* v. *Harris*, 612 F.2d 993 (5th Cir. 1980). Accordingly, the plaintiff's motion to strike parts of the defendant's answer in this case should be denied. All other motions filed by the plaintiff or the defendant which have not been acted on should also be denied.

SCOPE OF REVIEW

It is beyond argument the law is that upon a judicial review of a final decision of the Secretary of Health and Human services a reviewing court is limited to determine whether or not the decision of the Secretary is supported by substantial evidence. Substantial evidence means more than a scintilla and must do more than create a suspicion of the existence of the fact to be established, *Natinal Labor Relations Board* v. *Columbian Enamel and Stamping Company*, 306 U.S. 292 (1939), and nothing less than such relevant evidences as a reasonable mind might accept as adequate to support a conclusion will do. *Richardson* v. *Perales*, 402 U.S. 389 (1971). If the administrative findings are so supported, the findings are not conclusive; the reviewing court may not reweight the evidence or substitute its judgment for that of the administrative finder even if the reviewing court views the evidence as preponderating otherwise. *Strickland* v. *Harris*, 615 F.2d 1103 (1980); *Laffoon* v. *Califano*, 558 F.2d 253 (5thCir. 1977). The evidence must be considered as a whole, *Simmons* v. *Harris*, 602 F.2d 1233 (5th Cir. 1979), including objective medical factors or clinical findings, diagnosis of physical examination, subjective evidence of pain and disability if testified to by the claimant and corroborated by others, if any, and the

claimant's age, education and work history. *DePaepe* v. *Richardson*, 464 F.2d 92 (5th Cir. 1972). The claimant in a Social Security matter seeking disability income benefits has the burden of producing substantial evidence to establish his disabiity. *Western* v. *Harris*, ____ F.2d ____, Slip Opinion No. 80-3386 (5th Cir. Jan. 9, 1981).

In order to be entitled to benefits under the Act, the plaintiff must establish that he became disabled on or before the last date on which he met the special earnings requirement of the Act, *Hart* v. *Finch*, 404 F.2d 1340 (5th Cir. 1971), and any impairment of which had its onset or became disabling after the special earnings test was last met cannot be the basis for a favorable finding of disability. *Seales* v. *Gardner*, 356 F.2d 508 (5th Cir. 1966).

In this case, it is clear that Herbert Jordan, plaintiff, last met the special earnings requirement of the Social Security Act on June 30, 1963. The plaintiff has filed several applications for disability Social Security insurance benefits which include the dates of July 1, 1959; November 9, 1964; October 23, 1967; and February 19, 1969. The application under consideration here was filed on July 27, 1973. On all applications except the one under consideration the plaintiff failed to follow through and exhaust his administrative remedies after he was denied benefits initially by the Social Security Administration thus making the determinations final as to them. Upon administrative and initial denial of benefits on his 1973 application he requested a hearing before an ALJ before whom he and his representative appeared. The ALJ considered his case *de novo* and concluded that he was not under a disability. The Social Security Appeals Council reviewed plaintiff's case and affirmed the decision of the ALJ thus paving the way for the action in this Court pursuant to 42 U.S.C. 405(g).

The plaintiff in this case was born on April 25, 1930. He has a high school education and at least one year in college. He spent a number of years in the U.S. Army and was discharged for medical reasons. The medical evidence and his testimony tend to demonstrate that on or about August 31, 1955, he had a

stroke. He was admitted to an Army hospital on September 7, 1955, and the medical diagnosis was thrombosis of the pontine arterial branch due to an unknown cause. After showing improvement, he was discharged to duty on or about December 7, 1955.

On or about August 9, 1956, he was admitted to another Army hospital for persisent headaches. Examination allegedly reflected poor motivation with a hysterical basis for his complaints. On May 19, 1958, plaintiff was again hospitalized because of occasional right fronto-temporal headaches existing with exertion and fatigue. Upon physical examination he was discovered to have microscopic hematuria on pyuria. On February 10, 1959, a certified neurologist made a neurological evaluation of the plantiff and found moderate right lower facial weakness, a slight speech defect, and a tendency to drag the left foot in a hemiplegic fashion. He had difficulty walking on his heels and toes and there was ataxia on the left sice with finger-to-fnger and heel-to-toe test. Examination reflected evidence of encephalopathy because of motor and sensory impairment.

On June 22, 1959, plaintiff went to the Veterans Administration Hospital in Tuskegee, Alabama, complaining of sharp, continuous pain over the anterior surface of the left thig. Physical examination revealed that he could elevate his shoulder to about 90 degrees and he walked with a mild limp favoring the left side. There was no atrophy or hypertrophy of the muscles although there was muscle weakness in the legs and thighs. Other neurological findings were within psyiological limits, laboratory results were within normal limits and X-ray of the left thigh and chest revealed no pathology. Plaintiff received no medication during his hospital stay. He experienced mild subsidence of his pain and was discharged at his request on July, 1959, before undergoing all the tests he had been admitted for. Final diagnosis was cerebral vascular accident probably due to thrombosis with paresis of the left side and paraylsis of the right side of the face. At the time of his discharge his condition was unchanged.

After the plaintiff's insured status expired on June 30, 1963, he continued to have medical problems and medical examinations. Neurological examinations on April 1, 1965, and December 2 1966, at the Montgomery, Alabama, Veterans Administration Hospital confirmed the diagnosis of thrombosis pontine angle artery manifested by paresis of the muscles of the left upper and lower extremeties, trunk and right side of the face, encepyalopathy and paresthesias on the left side of the body and right side of the neck. Laboratory rests were negative except for an EEG which showed thalamic epilepsy recurrence.

A consulative report dated March 27, 1977, revealed that plaintiff had apparently a number of vascular accidents involving the brain stem with a crossed hemiplegia.

In 1975 plaintiff developed diabetes mellitus diagnosed in 1967. He takes insulin for his diabetes. Medical reports between 1973 and 1975 confirm plaintiff's testimony that he had complaints relating to his disability, his semi-paralysis, enlarged heart and pain.

At his oral hearing before the ALJ plaintiff testified that his only work experience outside of the Army was, that on his own intiative after reading an advertisement in a newspaper, he secured a job in 1961 at the Veterans Administration Hospital here he worked until either 1964 or 1966. He claims that his work at the hospital was not of a substantial nature in that he was consistently absent from his duties by reaon of his physical condition and that his superior at the hospital did not expect or require him to perform on a full-time basis as other employees were expected to perform. At the hearing plaintiff claims that he has not worked since 1964 but there is an exhibit which he introduced which suggests that he worked until December of 1966. At his hearing, he testified that he had diabetes for which he receives shots and an enlarged heart which causes him pain. He claims his ailments began in 1963.

The ALJ reviewed all other evidence presented to hm, considered the testimony at the oral hearings and the medical

evidence evidenced by the exhibits contained in the administrative transcript. In evaluating the medical evidence the ALJ pronounced that such evaluation should be directed primarily to determine as far as possible the precise degree of functinal loss or restriction that resuls from the plaintiff's physical and/or mental impairments. It is the extent of limitation of plaintiff's ability to engage in physical activity such as sitting, walking, reaching, manipulating and to perform normal mental functions and it is only through an assessmment of these capacities that a meaningful decision can be made with respect to the plaintiff's ability to engage in substantial gainful activity.

The ALJ considered the plaintiff's receipt of Veterans Administration benefits for disability. He considered the fact that plaintiff engaged in work activity with the Veterans Administration Hospital afaer securing the emloyment on his own as a nursing assistant and that he worked at this job until 1964 during one period of time and during another period of work until 1966 and that he began this employment in 1961 before his insured status ended in June of 1963.

The ALJ stated, though, that he was not satisfied from all the evidence that plaintiff became disabled within the meaning of the Social Security Act, as amended, at a time prior to June 30, 1963.The ALJ also stated that he was not satisfied that after a careful review of all the medical evidence and weighing the testimony of the plaintiff at the oral hearing that plaintiff became disabled within the meaning of the Act prior to June 30, 1963. The ALJ further found that plaintiff continued to work for over one year after he last met the special earnings requirement of the Act. It is noted here that work performed during a period of disability may demonstrate a capabilty to perform or engage in substantial gainful work activity. *See Smith* v. *Weinbrger*, 381 F. Supp. 407 (U.S.D.C. E.D. Wis. 1974). The ALJ further found that upon consideration of the multiple complaints of plaintiff concerning headaches, his heart and chest pains, and weakness of his extremities were not of such severity prior to June 30, 1963, as would prevent plaintiff from performing substantial gainful work activity.

There is substantial evidence in this case to support the decision of the defendant Secretary.

The defendant Secretary prays for judgment dismissing the complaint with costs and disbursments. Accordingly, it is

RECOMMENDED that the plaintiff's motion to strike parts of the defendant's answer in this case be denied. It is further

RECOMMENDED that all other motions filed by th eplaintiff or the defendant should be denied. It is further

RECOMMENDED that the defendant's prayer for judgment dismissing the complaint with costs and disbursements be denied. It is further

RECOMMENDED that the decision of the defendant Secretary denying plaintiff's application for a period of disability and for disability insurance benefits under the Social Security Act, as amended, be affirmed.

Done this 5th day of February.

M. Lewis Gwaltney
UNITED STATES MAGISTRATE

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate and to serve by mail a copy thereof on the parties to this action. The parties re directed to file any objections to the aid recommendation within a period of thirteen days from the date of mailing to them. Any objections file to the Recommendation of the Magistrate must be specific and directed to that part or parts of the recommendation which are objected to.

Done this 5th day of February, 1981.

M. Lewis Gwaltney
UNITED STATES MAGISTRATE

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 80-116-N

HERBERT JORDAN,

Plaintiff,

v.

RICHARD S. SCHWEIKER, *etc.*,

Defendant.

FILED
JUL 15 1982
JANE P. GORDON, CLERK

OPINION

This cause is now before the court on the recommendation of the U.S. Magistrate and the plaintiff Herbert Jordan's objections to the recommendation. Upon consideration of the recommendation and the objections, and upon a de novo determination of the proceedings, including a review of the file and the transcript of administrative proceedings, the court is of the opinion that the objections are to be overruled and that the recommendation is due to be affirmed.

DONE, this 15th day of July, 1982.

Myron Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 80-116-N

HERBERT JORDAN,

Plaintiff,

v.

RICHARD S. SCHWEIKER, *etc.*,

Defendant.

FILED
JUL 15 1982
JANE P. GORDON, CLERK

JUDGMENT

Pursuant to the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of this court:

(1) That the plaintiff's objections be and they are hereby overruled;

(2) That the recommendation of the U.S. Magistrate be and it is hereby adopted;

(3) That all pending motions be and they are hereby denied; and

(4) That the decisin of the defendant Secretary denying the plaintiff's application for a period of disability and for disability insurance benefits under the Social Security Act be and it is hereby affirmed.

It is the further ORDER of the court that no costs be taxed.

DONE, this the 15th day of July, 1982.

Myron Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-7246

HERBERT JORDAN,
Plaintiff-Appellant,

v.

MARGARET M. HECKLER, Secretary of the
Department of Health and Human Services,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

(January 31, 1984)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

Appellant Herbert Jordan filed an application for disability insurance benefits on July 27, 1973. The Social Security Administration denied the application initially and on reconsideration. After appellant requested a hering, he and a lay reprsenative appeared before an administrative law judge for de novo consideration. On November 13, 1975, the administrative law judge issued his opinion which concluded that Jordan did not qualify for disability insurance benefits. On March 6, 1980, the Appeals Council reviewed Jordan's case, using the new vocational factors regulations, and affirmed the decision of the administrative law judge without modification.

Jordan sought judicial review pursuant to 42 U.S.C. sec. 405(g) on Mrch 21, 1980. The case was referred to a magistrate who recommended that the decision of the Social Security

Administration be affirmed. The district court adopted the magistrate's recomendation and affirmed the denial of benefits. The focus of Jordan's appeal to this court is that the Social Security Administration is bound, by principles of collateral estoppel and res judicata, to follow a prior decision by the Court of Claims holding that Jordan was 60% disabled at the time of his discharge from the Army in 1958, was unable to perform his duties as sergeant and thus entitled to a medical discharge.

Jordan's medical difficulties began on August 31, 1955 when he suffered a stroke during the night. At that time, Jordan was serving in the Army. He was admitted to the local hospital and later transferred to Walter Reed hospital, where he remained for over a month. He was then discharged to return to duty. However, he was hospitalized again from January 17, 1956 until August 9, 1956. In December of 1958, after additional hospitalization, Jordan was discharged from the Army.

The record indicates that following his discharge Jordan continued to have medical problems, medical examinations, and periods of hospitalization. In June of 1959, the Veterans Administration Hospital diagnosed Jordan as suffering from a cerebral vascular accident probbly due to thrombosis with paresis of the left side and paralysis of the right side of the face. This diagnosis was confirmed by subsequent neurological examinations at another Veterans Administration Hospital in April of 1965 and December of 1966. A report by a consultant, dated March 22, 1972, revealed that Jordan had apparently had a number of vascular accidents involving the brain stem with a crossed hemiplegia. Medical reports between 2973 and 1975 confirmed Jordan's testimony at his hearing that he had comlaints relating to his disability, his semi-paralysis, enlarged heart, and pain.

At his administrative hearing, on August 18, 1975, Jordan testified that he was unable to grip anything with one arm and could not move the arm despite extensive physical therapy. He wore a brace on his left foot because of an inability to control

the muscles there. Jordan also testified that he had diabetes and an enlarged heart and suffered from severe headaches.

Jordan testified that the only employment he had held outside of the Army was as a nursing assistant at a Veterans Administration Hospital and that his physical disabilities prevented him from fully performing this job. Instead, he performed light duties such as supervising patients' smoking. Jordan testified that when he was accepted for the position, the doctor who examined him stated that he was not physically fit to do any work. The doctor employed him, however, to help him pay for his medication. Jordan testified that during this time he was frequently in the Veterans Administration Hospital as a patient.

In his decision recommending that Jordan's denial of benefits be affirmed, the administrative law judge summarized the medical evidence in the record and Jordan's testimony at the hearing. The administrative law judge recognized that Jordan had received Veterans' Administration benefits for disability beginning shortly after his discharge. Also noted was the fact that after a lengthy proceeding through the administrative processes with the military, Jordan was successful in 1972 in having his original discharge set aside and replaced with a medical retirement for disability.

After summarizing these facts, the administrative law judge noted that Jordan's latest date for meeting the special earnings requirement of the Act for disability insurance purposes was June 30, 1963. In order to be entitled to benefits, Jordan had to show that he became disabled within the meaning of the Social Security Act, as amended, at sometime prior to June 30, 1963 and that the disability had continued up until at least fourteen months prior to the date of the filing of the application for benefits. The administrative law judge concluded that he was not satisfied from all the evidence that Jordan became disabled within the meaning of the Act at a time prior to June 30, 1963.

Jordan brought an action under 42 U.S.C. sec. 405(g) in district court to review his disallowance of disability benefits

under the Social Security Act. In his motion to strike portions of the defendant's answer, Jordan emphasized that the findings of the administrative law judge failed to take notice of the findings and conclusions by the United States Court of Claims in its review of Jordan's military discharge. *Jordan* v. *United States*, 205 Ct.Cl. 65 (1974). Jordan contended that the government was estopped from making findings or conclusions regarding Jordan's physical condition or ability to work which were different from those found and established by the Court of Claims.

Jordan's case was referred to a magistrate who recommended that the decision of the Social Security Administration be affirmed. In addressing the prior Court of Claims decision, the magistrate specifically concluded that the decision was extra-record evidence which could not be considered in a review of the case. The magistrate deemed the court's limited review to be confined to a determination of whether or not the Secretary's decision was supported by substantial evidence and concluded that this determination should be made exclusively on the certified administrative record. In the rest of his recommendation, the magistrate summarized the decision of the administrative law judge and concluded that it was supported by substantial evidence. The district court adopted the recommendation of the magistrate and affirmed the decision denying Jordan disability insurance benefits under the Social Security Act.

In his suit before the Court of Claims, Jordan had contended that on the date of his discharge from the Army he was unfit for duty by reason of permanent disabilities and therefore eligible for disability retirement pay. *Jordan* v. *United States*, 205 Ct.Cl. 65 (1974). After an exhaustive review of Jordan's entire medical history, the court concluded that the earlier decision by the Army Board for Correction of Military Records was arbitrary, capricious, and not supported by substantial evidence. The court concluded that, on the basis of all the evidence, at the time of his discharge Jordan had clearly been unfit for duty by reason of permanent disability from the residuals of a stroke.

Jordan's case before the Court of Claims ironically predsented a situation somewhat similar to the present one. Jordan was appealing the decision of the Board partly because he had received a Veterans Administration rating of a 60% disability. The Court of Claims concluded that despite the fact that the Veterans Administration applied standards of evaluation for civilian disability which are different than the Army standards for active military service, the court could not reconcile the medical evidence established in the determination of disability with the Board's refusal to classify Jordan as unfit for duty at the time of his discharge. Among the findings of fact made by the Court of Claims were:

> 21.(a) On March 27, 1962 plaintiff [Jordan] was examined by the VA at its facility in Montgomery, Alabama, for an evaluation of his disability. At that time, he was employed at the Veterans Administration Hospital in Montgomery as a nursing assistant. The examining physician stated that: "Gross examination and observation of this veteran, one cannot see how he can be a nursing assistant at the VAH. He is not physically able to do the work anywhere near satisfactorily or enough to be worth hiring a man in this situation."

Jordan v. *United States*, 205 Ct.Cl. 65, 69 (1974). Also adopted as findings of fact were various medical reports demonstrating the severity of Jordan's ailments prior to 1963.

Finding of fact "21.(a)" by the Court of Claims contradicts the statement in the administrative law judge's opinion that:

> The claimant was working during this approximately three year period [1961-1964] at work which, presumably, was available in the hospital and he performed to *the obvious satisfaction of the parties in this work activity*. He continued to work for over one year after he last met the special earnings requirements of the Act, the reason for his ceasing to be able to work at this type activity was the stroke which he had at such time.

Record Vol. 2 at 14 (emphasis added). We note that the administrative law judge cited no basis for his determination that

"everyone" was "obviously satisfied" with Jordan's performance. The administrative law judge concluded:

> The claimant has failed to establish to the satisfaction of the Administrative Law Judge that he became disabled within the meaning of the Social Security Act, as amended, at any time prior to the June 30, 1963, the date he last met the special earnings requirements of the Act.

Record Vol. 2 at 14. In his enumerated findings, the administrative law judge also stated:

> 5. The claimant has failed to establish that his medical condition was such as to preclude him from performing any type of substantial gainful work activity consistent with his age, education and prior work experience at any time prior to June 30, 1963, the date he last met the special earnings requirements of the Act.
>
> 6. The Administrative Law Judge has considered the multiple complaints of the claimant concerning his headaches, his heart and chest pains, and his weakness of extremities, which were primarily related to his claim for disability associated with a stroke and does not find that such condition, either singularly or in concert, were of such severity prior to June 30, 1963, as would prevent him from performing substantial gainful work activity.
>
> 7. The claimant has failed to establish that he became disabled within the meaning of the Social Security Act, as amended, at any time prior to June 30, 1963, the date he last met the special earnings requirements of the Act.

Record Vol. 2 at 15-16. After stating the last finding, the administrative law judge concluded that Jordan was not entitled to a period of disability or to disability insurance benefits.

The findings of the administrative law judge directly conflict with the findings of the Court of Claims cited to show that the Army improperly declared Jordan fit for service at the time of his discharge. Jordan now contends that the Court of Claims determination of a finding that Jordan could not satisfactorily perform his job (finding of fact 21.(a), *supra*) precluded

reconsideration of that fact in his subsequent social security proceedings. Jordan bases his argument on the principles of res judicata and collateral estoppel as described in *United States* v. *Moser:*

> The general principle announced in numerous cases is that a right, question, or *fact* distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or *fact* once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

266 U.S. 236, 241, 45 S.Ct. 66, 67, ___ L.Ed. ___, ___ (1924), *quoting Southern Pacific R.R. Co.* v. *United States*, 168 U.S. 1, 48, 18, 27, 42 L.Ed. 355, ___ (1897) (emphasis added). The court below did not reach[1] and this court also declines to decide this argument.

This court agrees with the court below that a review of the decision of the Secretary must be limited to an examination of the evidence before the administrative law judge. The court is not allowed to look at evidence beyond the record in determining whether the criteria of substantial evidence was met. *Mann* v. *Gardner*, 380 F.2d 182, 187 (5th Cir. 1967). Jordan did not put before the administrative law judge the findings of the Court of Claims or the 1962 medical report upon which finding of fact 21.(a) was based. This court is aware that Jordan was without representation during the proceedings before the ALJ. We, therefore, do not find the omissions from the record controlling. We reach this conclusion because even if the finding of fact about Jordan's ability to perform his job had been

---

[1] The court below instead concluded that the Court of Claims decision was extra-record evidence which could not be considered.

part of the record,[2] he still would not have been disabled under the terms of the Act before June 30, 1963.

The claimant bears the initial burden of establishing his disability. To meet this burden, the claimant must prove that he is unable to perform his previous work. *Walden* v. *Schweiker*, 672 F.2d 835, 8389-39 (11th Cir. 1982). In this case, the ALJ noted that Jordan worked at the Montgomery VAH for a three-year period from 1961 until 1964. Although there is no support for his determination that Jordan performed to the satisfaction of the hospital, the ALJ correctly found that Jordan continued to work for over a year after he last met the special earnings requirement of the Act. Evidence in the record also indicates that Jordan may have worked for another period which ended in 1966.[3] Whether or not an examining physicial questioned Jordan's ability to handle the nursing assistant job (finding of fact 21.(a)), it is clear that that Jordan continued to hold down that job well past June 30, 1963.

The Secretary's decision that Jordan was not disabled on the applicable date is supported by substantial evidence. Substantial evidence consists of such relevant evidence as a reasonable person would accept as adequate to support a con-

---

[2] We note that Jordan's own testimony presented the administrative law judge with the contention that Jordan was unable to perform the duties for which he was employed.

> Question: Mr. Jordan, when you were an employee at the VA Hospital in Tuskegee, did they grant you any special consideration due to the fact that you were a veteran, due that you were a disabled veteran?
>
> Answer [Mr. Jordan]: Yes, sir. When I was taken on the job, Dr. Marsh told me that I was not physically fit to do any work. He's retired and still living in this area and he stated that I was not physically able to work but due to—at that time I had to buy a lot of medicine and he did that to help me to be able to buy my medicine.

Record, Vol. 2 at 51.

[3] This fact was never conclusively established. Jordan testified that he stopped work in 1964.

clusion. *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983). This standard of review does not relieve the court of its responsibility to scrutinize the entire record to ascertain whether substantial evidence supports each essential administrative finding. *Walden* v. *Schweiker*, 672 F.2d at 838. Such a review has been undertaken here. Judgment of the district court is thereby AFFIRMED.

APPENDIX E

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

NO. 82-7246

D.C. Docket No. CA80-116-N

HERBERT JORDAN,
Plaintiff-Appellant,

versus

MARGARET M. HECKLER, Secretary of the Department of Health and Human Services,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 28 1984
SPENCER D. MERCER
CLERK

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Judgment of the

said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 31, 1984
For the Court: Spencer D. Mercer, Clerk

By: [illegible]
DEPUTY CLERK

ISSUED AS MANDATE: MAR 28 1984

APPENDIX F

In The United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 82-7246

HERBERT JORDAN,
Plaintiff-Appellant,

versus

MARGARET M. HECKLER, Secretary of the Department of Health and Human Services,
Defendant-Appellee.

Appeal From The United States District Court For The Middle District Of Alabama

---

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 20 1984
SPENCER D. MERCER
CLERK

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 31, 1984, 11 Cir., 198_, ____ F.2d ____).

(MAR 20 1984)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Thomas A. Clark
THOMAS A. CLARK
United States Circuit Judge

APPENDIX G

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of

Herbert Jordan (Claimant)

Claim for

Period of Disability and
Disability Insurance Benefits

416-40-7273 (Social Security Number)

This case is before the Administrative Law Judge on a request for hearing timely filed by the claimant. The hearing was held in Montgomery, Alabama, on August 18, 1975, and the claimant appeared in person and testified.

ISSUES

The general issues before the Administrative Law Judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under Section 216(i) and 223, respectively, of the Social Security Act, as amended. The specific issues are whether the claimant was under a "disability," as defined in the Act and, if so, when such disability commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and Section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) of the Social Security Act defines disability (except for certain cases of blindness) as the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Section 223(d)(2)(A) further provides that "an individual (except a widow, surviving divorced wife, or widower for purposes of Section 202(e) or (f) . . .) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Section 223(d)(3) further states "For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Section 404.1524(c) of the Regulation No. 4 states, in part, that the "evidence shall also describe the individual's capacity to perform significant functions such as the capacity to sit, stand, or move about, travel, handle objects, hear or speak, and, in cases of mental impairment, the ability to reason or to make occupational, personal, or social adjustments."

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony adduced at the hearing, the arguments made, any

briefs submitted, and all credible evidence set out in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

The evaluation of the medical evidence in the record should be directed primarily to determining, insofar as possible, the precise degree of functional loss or restriction that results from the claimant's physical and/or mental impairments. In other words, it is the extent of limitation of his ability to engage in physical activity such as sitting, walking, reaching, manipulating, etc., and to perform normal mental functions, e.g., remembering, reasoning, etc., that determine the true severity of his impairment, and it is only through an assessment of these capacities that a meaningful decision can be made with respect to the ability to engage in substantial gainful activity. However, to merit consideration and a determination of "disability," as defined in the Social Security Act, an allegation of functional limitations must be "medically determinable," e.g., it must be shown that it results from organic dysfunction or other demonstrable causes. In this regard, Section 404.1501(c) of Social Security Administration Regulations No. 4 states:

> "(c) Definition of Impairment. A physical or mental impairment is an impairment that results from anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. Statements of the applicant, including his own description of his impairment (symptoms) are, alone, insufficient to establish the presence of a physical or mental impairment."

The claimant appeared and testified at the hearing concerning his problems and their original onset. The claimant was in the Army for a number of years and had a stroke in approximately 1955, and recurrent problems of such a nature until approximately 1958 when he was discharged in December at the expiration of his term of enlistment. The claimant contends that he was disabled at such time and in fact, began receiving Veterans Administration benefits for disability shortly after his discharge. After a lengthy proceeding through the adminis-

trative processes with the military, the claimant was successful in 1972 in having his original discharge set aside and in its place a medical retirement for disability entered. The claimant contends that he has been continuously disabled since his retirement from the Army in December of 1958. He states that he has problems associated with a stroke which made his left side weak and made his arm useless, and which has become more complicated with time. At the present time the claimant has diabetes, enlarged heart and severe pain according to his testimony.

The claimant filed an application for a period of disability and disability insurance benefits in July of 1959. This application was denied and the claimant did not pursue this application further at such time. The claimant intended to go to school after his retirement from the military and attempt to get an education. The claimant stated that he was unable to continue in such type activities and abandoned this project. The claimant, thereafter in 1961, undertook work at the Veterans Administration Hospital as a nursing assitant. He testified that this duty was light duty and that many concessions were made in his performance of these duties. He stated that he got the job on his own application without any outside assistance or help. The claimant worked at this job until September of 1964. He stated that he had to quit at this time because of another stroke which he had which prevented him from further being able to work. The claimant then worked another period of time at the VA Hospital in Montgomery, Alabama, such period of work ending in December of 1966.

The claimant stated that his work activities at the VA Hospital were not of a substantial nature in that he was consistently absence from his duties and it was not expected or required to perform on a full time basis as other employees were expected to perform. Exhicit No. 23, introduced at the hearing, is an extract of the claimant's summary of his leave record while in Civil Service. This record shows that the claimant utilized fully all sick leave available to him and all the annual leave available to him, and in addition, took leave without pay for some 464 hours during this period of work.

The claimant filed applications for a period of disability and disability insurance benefits in 1964, 1967 and again in 1969. The claimant did not pursue any of these applications to the hearing level.

Although there are possible grounds for dismissal of the current application due to administrative finality of several of the prior applications; nevertheless, the Administrative Law Judge felt that the claimant was entitled to a full and complete hearing, never having had one before.

The claimant has not worked in covered employment since his retirement from the military effective in December of 1958, and for such reason last meets the special earnings requirements of the Act of disability insurance purposes on June 30, 1963. In order to be entitled to benefits the claimant must be able to show that he became disabled within the meaning of the Social Security Act, as amended, at sometime prior to June 30, 1963 and that such disability has continued up until at least fourteen months prior to the date of the filing of the application for benefits herein.

The position of the claimant was very capably put forward by Mr. Charlton, a DAV representative, at the hearing; however, the Administrative Law Judge is not satisfied from all the eveidence that the claimant became disabled within the meaning of the Social Security Act, as amended, at a time prior to June 30, 1963, and that such disability has continued up until at least fourteen months prior to the date of the filing of the current application herein. The indications of Mr. Charlton are that the Veterans Administration has a policy of hiring handicapped persons and keeping them on the payroll as long as possible. The Administrative Law Judge accepts this as a correct statement of the administrative policy of the Veterans Administration, including the Veterans Administration Hospital administered by such Administration.

After a careful review of all the medical evidence in the file and careful weighing of the testimony of the claimant at the hearing, the Administrative Law Judge is not satisfied that the

claimant became disabled within the meaning of the Social Security Act, as amended, at any time prior to June 30, 1963, the date he last met the special earnings requirements of the Act. The evidence indicated that the claimant secured on his own initiative, using his veteran's preference, a regular Civil Service job with the Veterans Administration Hospital. The claimant worked at this job from November 13, 1961 until September of 1964 when he sated he had to quit as a result of another stroke. The claimant was working during this approximately three year period at work which, presumably, was available in the hospital and he performed to the obvious satisfaction of the parties in this work activity. He continued to work for over one year after he last met the special earnings requirements of the Act, and according to his own testimony, the reason for his ceasing to be able to work at this type activity was the stroke which he had at such time. Exhibit No. 19 in the record, in summarizing the claimant's history from records available, indicates that the claimant was hospitalized in September of 1964 with the impression that he had had a thrombosis of the right paramedian branches of the basilar artery. This is consistent with the claimant's statement that he had another stroke in September of 1964 which prevented his further work activities at the hospital. It does appear that after some recovery the claimant did return to work at the Veterans Administration Hospital in Montgomery, Alabama, in 1966 and was on the rolls through May 8, 1967.

The claimant has failed to establish to the satisfaction of the Administrative Law Judge that he became disabled within the meaning of the Social Security Act, as amended, at any time prior to the June 30, 1963, the date he last met the special earnings requirements of the Act.

FINDINGS

Based upon all the credible evidence in the record, including the List of Exhibits filed herein and the testimony taken at the

hearing, the Administrative Law Judge makes the following findings in this case:

1. The claimant met the special earnings requirements of the Act on September 1, 1955, and continued to meet the special earnings requirements of the Act through June 30, 1963.

2. The claimant is forty-five years of age and has worked in the military and as a orderly and nursing assistant in the Veterans Administration Hospital.

3. The claimant suffered a stroke in approximately 1956 while on duty in the military and was discharged from the military and subsequently, such discharge was changed to a medical retirement for disability. The claimant has been receiving Veterans Administration benefits for disability since the approximate date of his discharge from the service in December of 1958.

4. The claimant was employed as a Civil Service employee with the Veterans Administration Hospital as a nursing assistant from November, 1961 through September, 1964, at which time he suffered an additional stroke resulting in his ceasing to be able to perform his regular work activities at the Veterans Administrations Hospital.

5. The claimant has failed to establish that his medical condition was such as to preclude him from performing any type of substantial gainful work activity consistent with his age, education and prior work experience at any time prior to June 30, 1963, the date he last met the special earnings requirements of the Act.

6. The Administrative Law Judge has considered the multiple complaints of the claimant concerning his headaches, his heart and chest pains, and his weakness of extremities, which were primarily related to his claim for disability associated with a stroke and does not find that such condition, either singularly or in concert, were of such severity prior to June 30, 1963, as would prevent him from performing substantial gainful work activity.

7. The claimant has failed to establish that he became disabled within the meaning of the Social Security

Act, as amended, at any time prior to June 30, 1963, the date he last met the special earnings requirements of the Act.

DECISION

Based on the application filed on July 27, 1973, the Administrative Law Judge finds that the claimant is not entitled to a period of disability and to disability insurance benefits under the provisions of Section 216(i) and 223, respectively, of the Social Security Act, as amended.

Bogue M. Waller
BOGUE M. WALLER
Administrative Law Judge

Date: November 13, 1975

Office - Supreme Court, U S
FILED
AUG 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1973

In the Supreme Court of the United States

OCTOBER TERM, 1984

HERBERT JORDAN, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1973

HERBERT JORDAN, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals improperly sustained the Secretary's determination that petitioner was not disabled within the meaning of the Social Security Act as of June 30, 1963. Specifically, petitioner claims that the Secretary and the reviewing courts erroneously declined to accord preclusive effect to the decision of the Court of Claims in *Jordan* v. *United States,* 205 Ct. Cl. 65 (1974), holding that petitioner was entitled to military disability retirement as of December 10, 1958, the date of his discharge from the Army.

1. Petitioner filed an application for Social Security disability insurance benefits on July 27, 1973. The Social Security Administration denied the application initially and adhered to its decision on reconsideration. A de novo hearing was then held before an administrative law judge.

The ALJ noted that the last date on which petitioner had met the earnings eligibility requirements of the Social Security Act applicable to disability insurance benefits was June 30, 1963 (Pet. App. 32a). Accordingly, to be entitled to benefits, petitioner had to establish that he became disabled within the meaning of the Social Security Act prior to that date. The ALJ observed that petitioner had suffered a stroke while in the Army in 1955; that, following his discharge at the end of his enlistment in 1958, he had received disability benefits from the Veterans' Administration; and that petitioner's original discharge had ultimately been set aside in favor of a military disability retirement (Pet. App. 28a-29a). The ALJ also noted, however, that petitioner had been employed as a nursing assistant at the VA hospital in Montgomery, Alabama, between 1961 and 1964, at which time he suffered another stroke that prevented him from continuing his work (*id.* at 29a, 32a). The ALJ concluded that petitioner had failed to establish that his ailments "were of such severity prior to June 30, 1963, as would prevent him from performing substantial gainful work activity" appropriate for one of his age, education and prior work experience (*id.* at 32a). On March 6, 1980, the Social Security Appeals Council upheld the ALJ's ruling (see *id.* at 13a).

Petitioner filed an action for judicial review of the final agency decision pursuant to 42 U.S.C. 405(g) in the United States District Court for the Middle District of Alabama. The district court referred the matter to a magistrate, who concluded that the agency's action was supported by substantial evidence and recommended that the Secretary's decision be sustained (Pet. App. 1a-9a). The magistrate rejected petitioner's argument that the Court of Claims' decision in *Jordan* v. *United States, supra,* required the Secretary to award him disability benefits. The magistrate explained that disability under the Social Security Act is

defined differently from disability in other legal contexts, and that the Court of Claims' findings and proceedings were outside the administrative record of this case (Pet. App. 2a-4a). The district court adopted the magistrate's recommendation (*id.* at 10a).

The court of appeals affirmed in an unpublished opinion (Pet. App. 13a-21a). Petitioner argued that, in light of the Court of Claims' decision in *Jordan* v. *United States, supra,* which held that he was 60% disabled at the time of his 1958 discharge, res judicata or collateral estoppel required the Secretary to award him disability benefits. As he does in this Court (see Pet. 4-5), petitioner relied, in particular, upon the following language from the Court of Claims' findings of fact (205 Ct. Cl. at 99):

> 21. (a) On March 27, 1962 [petitioner] was examined by the VA at its facility in Montgomery, Alabama, for an evaluation of his disability. At that time, he was employed at the Veterans Administration Hospital in Montgomery as a nursing assistant. The examining physician stated that: "Gross examination and observation of this veteran, one cannot see how he can be a nursing assistant at the VAH. He is not physically able to do the work anywhere near satisfactorily or enough to be worth hiring a man in this situation."

The court of appeals recognized that the ALJ's comment (Pet. App. 31a) that petitioner had "performed to the obvious satisfaction of the parties" in his job at the VA was contradicted by the Court of Claims' finding quoted above (*id.* at 17a). Moreover, because petitioner was without counsel in the administrative proceedings, the court of appeals did not rest its decision upon petitioner's failure to raise the preclusion claim before the ALJ (*id.* at 19a). The court of appeals found it unnecessary, as well, to decide whether the findings of the Court of Claims bound the

Secretary (*ibid.*). Rather, assuming that these findings were binding, the court of appeals concluded that they did not occasion any different disposition of the disability claim (*id.* at 19a-20a).

The court of appeals noted that petitioner had the burden of establishing his disability, and that it was undisputed that petitioner was in fact employed for over a year after the time he claimed he was unable to work (Pet. App. 20a). The court explained (*ibid.*): "Whether or not an examining physician questioned [petitioner's] ability to handle the nursing assistant job (finding of fact 21.(a)), it is clear that [petitioner]continued to hold down that job well past June 30, 1963."The court also observed that the record showed that the ALJ was aware of petitioner's claim that he was in fact unable to perform the duties associated with the nursing assistant's job he had held (Pet. App. 20a n.2).

2. Petitioner claims (Pet. 5-8) that the court of appeals refused to give determinative effect to the Court of Claims' decision in *Jordan* v. *United States, supra,* because it improperly relied upon the rule that judicial review of administrative action is limited to the agency record. Petitioner misapprehends the court of appeals' ruling. Because petitioner had no counsel in the proceedings before the ALJ, the court of appeals stated (Pet. App. 19a): "We * * * do not find the omissions from the record controlling." Petitioner quotes out of context (Pet. 6) the following statement from the court of appeals' opinion (Pet. App. 19a):

> This court agrees with the court below that a review of the decision of the Secretary must be limited to an examination of the evidence before the administrative law judge. The court is not allowed to look at evidence beyond the record in determining whether the criteria of substantial evidence was met.

But this passage merely announced the court of appeals' adherence to the general rule, which is of undoubted validity. See 42 U.S.C. 405(g). As we have noted, because of petitioner's pro se status in the administrative proceedings, the court declined to apply the general rule in this case. There is accordingly no occasion for considering here whether, as petitioner seems to urge, preclusion doctrines justify an exception to the usual limitation on judicial review to the record before the administrative agency.[1]

3. a. Petitioner claims (Pet. 8-10) that the court of appeals erroneously decided that preclusion doctrines do not apply to administrative determinations under the Social Security Act. In fact, the court of appeals explicitly stated that it "decline[d] to decide this argument" (Pet. App. 19a), because it was unnecessary to do so in this case. Rather, as we have explained (pages 3-4, *supra*), the court of appeals assumed that the Court of Claims' findings were binding to the extent that they were applicable, but concluded that none of those findings was inconsistent with the Secretary's conclusion that petitioner had not established disability as of the critical date, June 30, 1963.

Petitioner has not taken issue with the court of appeals' conclusion that there was no inconsistency between the Secretary's denial of disability benefits and the Court of Claims' Finding 21.(a). Nor is any necessary inconsistency

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[1]In *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984) (*Stauffer II*), the Court approved the application of collateral estoppel even though the estoppel argument had been raised for the first time in the court of appeals. Slip op. 3 n.2. The Court took care to explain, however, that the decision (*Stauffer I*) upon which the preclusion claim was based had not been rendered at the time *Stauffer II* was in the district court. Slip op. 3 n.2. At least when a matter as to which preclusion is asserted is factual, and thus should be considered by an agency at the time the evidence in the record is assessed, there is no reason to excuse a litigant's failure to raise his estoppel claim at the earliest opportunity.

apparent. The finding that an examining physician questioned petitioner's fitness to perform his nursing assistant's job on a given date in 1962 certainly does not establish that petitioner was in fact unable to hold that job — a point that was not in issue before the Court of Claims.[2]

Moreover, as the court of appeals emphasized, the Secretary was plainly authorized to consider, together with the 1962 medical evaluation, the fact that petitioner did continue to work for some two years thereafter. Under the Social Security Act, of course, the controlling question was not whether petitioner was fit to perform his nursing assistant's job, but whether his impairments were of "such severity that he [was] not only unable to do his previous work but [could] not, considering his age, education, and work experience, engage in any kind of substantial work which exists in the national economy" (42 U.S.C. 423(d)(2)(A)). See *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 1-2. The Secretary's finding that petitioner had not borne the burden of demonstrating disability under this standard was not inconsistent with the Court of Claims' Finding 21.(a).[3]

b. Petitioner's repeated references to res judicata in addition to collateral estoppel (see Pet. 5, 6, 8) suggest that he may intend to invoke the claim preclusion doctrine as well as the related doctrine of issue preclusion (collateral estoppel). See *Allen* v. *McCurry*, 449 U.S. 90, 94 n.5 (1980); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). But res judicata is plainly inapplicable here because

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[2]The issue before the Court of Claims was, of course, whether petitioner was fit to perform his military duty as a sergeant at the time of his separation in 1958.

[3]Petitioner has not alleged that any other specific finding of the Court of Claims was inconsistent with the Secretary's ruling. See Pet. 5.

petitioner's application for Social Security disability benefits is not the same "claim" as his earlier request for military disability retirement benefits.

The issue decided in *Jordan* v. *United States, supra,* was whether petitioner was unfit to perform his particular military duties. The statutory standard for military disability retirement — unfitness to perform the duties of the service member's particular "office, grade, rank, or rating because of physical disability" incurred while in service (10 U.S.C. 1201) — is significantly different from the standard applicable under the Social Security Act. See page 6, *supra.* Accordingly, the Court of Claims' conclusion that petitioner was eligible for military disability retirement in 1958 did not bar the Secretary from determining that petitioner was not disabled within the meaning of the Social Security Act in 1963.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

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